IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DAVID S. JOHNSON, and McDONALD, TINKER, SKAER, QUINN and HERRINGTON, P.A.,	)	
Plaintiffs,	)	
vs.	)	CASE NO. 04-1178-MLB
PFIZER, INC.,	)	
Defendant.	)	

MEMORANDUM AND ORDER

The court now considers Defendant's Motion for a Stay and Transfer of this case to the United States District Court for the District of New Jersey. (Doc. 5.) Plaintiffs filed a response opposing the motion (Doc. 12) and Defendant filed a reply. (Doc. 13.) Defendant subsequently filed a supplemental memorandum on December 3, 2004. (Doc. 14.) After carefully reviewing the briefs and applicable law, the court **GRANTS** Defendant's Motion to Stay and **DENIES** its motion to transfer without prejudice as described more fully herein.

BACKGROUND

Plaintiff Johnson was a pharmaceutical salesperson for Pfizer, Inc. (Pfizer), operating out of Wichita, Kansas. On October 30, 2000, Johnson filed a claim of

constructive termination under Pfizer's severance plan (Doc. 5, Ex. A.) At some point after filing this claim, Johnson retained the legal services of Plaintiff McDonald, Tinker, Skaer, Quinn, and Herrington, P.A. (McDonald Tinker). By the summer of 2001, the claim became subject to Pfizer's internal appeals process and was subsequently denied. Johnson, a Major in the United States Army Reserve, was deployed to Iraq in January 2004–prior to an arbitration hearing on his claim. (Doc. 1 ¶ 94.) The arbitration hearing was conducted in Wichita, Kansas on February 16-18, 2004. (Doc. 5, Ex. B.) A videotaped deposition of Johnson was presented as evidence at the hearing. *Id.*

On April 5, 2004, the arbitration panel awarded Johnson damages, finding that he was constructively terminated under Pfizer's severance plan. (Doc. 5, Ex. B, at 9-13.) The arbitration panel also awarded attorney's fees to Johnson in the amount of $77,629.95. *Id.* at 16. The panel ordered the award to be paid within thirty days of the date the award was issued. *Id.* Later, on April 22, 2004, counsel for Pfizer sent counsel for Johnson a draft of a release from liability, maintaining that it was a condition of paying out the attorney's fees and costs awarded by the panel. (Doc. 5, Ex. J.) Under Pfizer's interpretation of the severance policy, the release was necessary in order to pay out any benefits (including fees and costs) pursuant to the plan. *Id.* at 1. Plaintiffs state in their brief that, "[t]hese terms

were unacceptable and most importantly not part of the arbitration award." (Doc. 12, at 5 (emphasis in original).)

On May 6, 2004, Pfizer filed a complaint against Johnson seeking to vacate the arbitration award under the Federal Arbitration Act (FAA) in the United States District Court for the District of New Jersey. (Doc. 5, Ex. C.) That same day, Pfizer attempted to execute service on Johnson by serving Richard W. James, of McDonald Tinker, as an agent of Johnson. (Doc. 5, Ex. D.) After James notified Pfizer that he was not authorized to receive service of process on behalf of Johnson (Doc. 5, Ex. E), Pfizer obtained service on Johnson's wife at his residence on May 27, 2004. (Doc. 5, Ex. F.) Plaintiffs filed this suit in Kansas on June 1, 2004 to confirm the arbitration award. (Doc. 1.) They obtained service on Pfizer the next day.

On June 16, 2004, the district court in New Jersey issued a stay of that case for 180 days. (Doc. 5, Ex. H.) The stay was issued based on an affidavit signed by Johnson that he, (1) had not received service of process in the New Jersey case, (2) would suffer financial hardship defending an action in New Jersey, (3) is unable to assist in his defense of the New Jersey case because his ability to communicate with his attorneys is limited while deployed on active duty in Iraq. (Doc. 5, Ex. G.) He requested the stay pursuant to the Servicemembers Civil

Relief Act. *Id.*; *see* 50 U.S.C. app.§ 522 (Supp. 2004).

DISCUSSION

Pfizer argues that under the well-established first-to-file rule, the court in New Jersey should adjudicate all procedural and substantive issues including the issue of whether venue is proper in New Jersey and/or in Kansas, and which court should decide the merits of the two lawsuits. It maintains that the rule applies because the two cases involve the same parties and issues, and that any other result would lead to inconsistent or duplicative rulings. Plaintiffs argue that compelling circumstances exist, which prevent application of the general first-to-file rule. Namely, Plaintiffs argue that Pfizer engaged in a "race to the courthouse" so it should not benefit from the rule. Furthermore, Plaintiffs maintain that there is no chance for inconsistent or duplicative judgments because the New Jersey case is stayed. Finally, Plaintiffs maintain that it would be inconvenient and expensive for Johnson to be "forced to litigate" in New Jersey.

The Tenth Circuit applies the first-to-file rule, which "permits a district court to decline jurisdiction where a complaint raising the same issues against the same parties has previously been filed in another district court." ***Buzas Baseball, Inc. v. Bd. of Regents of the Univ. of Ga.***, 189 F.3d 477 (table), 1999 WL 682883, at *2 (10th Cir. Sept. 2, 1999); *see* ***Hospah Coal Co. v. Chaco Energy Co.***, 673

F.2d 1161, 1163 (10th Cir. 1982); ***Cessna Aircraft Co. v. Brown***, 358 F.2d 689, 692 (10th Cir. 1965). The parties only need be substantially similar for the rule to apply. *See* ***Ed Tobergte Assocs. v. Zide Sport Shop***, 83 F. Supp. 2d 1197, 1198 (D. Kan. 1999); ***Graphic Tech., Inc. v. McDonald's Operations Assn.***, No. 00-2349-GTV, 2000 WL 1920034, at *1 n.2 (D. Kan. Dec. 21, 2000). This case certainly involves the same parties and issues. The cases are mirror images of one another: one seeks to vacate the arbitration award, while the other seeks to confirm it. The only reason McDonald Tinker is a named party in the Kansas case is due to its claim against Pfizer for attorneys' fees pursuant to the arbitration award.

However, the immediate issue is not whether "jurisdiction and venue are proper in the District of Kansas . . . but which court should decide those issues." ***Ed Tobergte***, 83 F. Supp. 2d at 1199. Under the rule, the first court to obtain jurisdiction applies the first-to-file rule and exceptions in order to determine the appropriate forum for the case.[1] *See* ***Custom Energy, L.L.C. v. Liebert Corp.***, No

[1] Neither party has addressed the issue of whether <u>any</u> federal court has jurisdiction to confirm the award by the arbitration panel. While both parties in their respective complaints agree that there is an independent basis for diversity jurisdiction under 28 U.S.C. § 1332, neither has shown express or implied consent to judicial confirmation of the arbitration award. *See* ***P&P Indus. v. Sutter Corp.,*** 179 F.3d 861, 866-67 (10th Cir. 1999). A review of the arbitration provision in this case does not disclose any <u>express</u> agreement that the award will be subject to judicial confirmation. *See* Doc. 5, Ex. A at § 20.3.

Some courts have found <u>implied</u> consent to judicial confirmation where the

98-2077-GTV, 1998 WL 295610, at *1 (D. Kan. June 2, 1998) (collecting cases); ***Daimler-Chrysler Corp. v. Gen. Motors Corp.***, 133 F. Supp. 2d 1041, 1042-44 (N.D. Ohio 2001) (same). In fact, the cases cited by Plaintiffs overwhelmingly support the assertion that the court in a second-filed case should not determine the initial question of which court applies the first-to-file rule. *See, e.g.*, ***Universal Premium Acceptance Corp. v. Oxford Bank & Trust***, No 02-2448-KHV, 2002 WL 31898217, at *2-3 (holding that the first-filed court should decide whether to apply the first-to-file rule despite the fact that an exception to the rule is appealing); ***Henson v. Unique Concepts, Inc.***, No. 86-2038-S, 1986 WL 15761, at

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arbitration agreement states that the arbitration shall be "final and binding." ***P&P Indus.,*** 179 F.3d at 867. This "finality exception," however, has been subject to criticism. *See, e.g.*, ***Oklahoma City Assn. v. Wal-Mart Stores, Inc.,*** 923 F.2d 791,794 (10th Cir. 1991). In this case, the arbitration provision states that the arbitration panel's findings "shall be binding on the Company and the Participant," (Doc. 5, Ex. A at § 20.3), but does not use the word "final."

Another basis for finding an implied consent to judicial confirmation is where the arbitration provision provides that the arbitration will be governed by the rules of the American Arbitration Association (AAA). Since the AAA rules specifically provide that the parties to the rules are deemed to have consented that judgment on the arbitration award may be entered in any federal or state court having jurisdiction, courts have found this to be a sufficient implied consent to judicial confirmation. *See* ***P&P Indus.,*** 179 F.3d at 867. In this case, the arbitration provision states that all of the three arbitrators shall be selected from a list provided by the AAA, and if agreement cannot be reached on the third arbitrator, the AAA shall select that third arbitrator. (Doc. 5, Ex. A at § 21.) It does not provide, however, that the arbitration will be conducted under the AAA rules.

(D. Kan. May 8, 1986) (applying the first-to-file rule as the first filed court and finding that an exception does not apply); ***Employers Reinsurance Corp. v. MSK Ins., Ltd.***, No. 01-2605-CM, 2003 WL 21143105, at *6 (D. Kan. Mar. 31, 2003) (deciding proper venue after the second-filed case in New York was stayed). *But see* ***Heatron v. Shackelford***, 898 F. Supp. 1491, 1494 (D. Kan. 1995) (applying an exception to the first-to-file rule despite status as second-filed court). Because jurisdiction attached to the District of New Jersey before it attached to this court, the District of New Jersey would normally be the court to apply the first-to-file rule and its exceptions.

Plaintiffs urge the court to consider that the first-to-file rule is not automatic, and that an exception applies if "compelling circumstances" exist. This district has recognized compelling circumstances where, (1) the first-filed suit is a declaratory judgment action triggered by receipt of a notice letter, *e.g.*, ***Heatron v. Shackelford***, 898 F. Supp. 1491, 1494 (D. Kan. 1995), and (2) where "the first-filed suit is an improper anticipatory filing, or one made under threat of a presumed adversary filing the mirror image of that suit in a different district." *E.g.*, ***Employers Reinsurance Corp. v. MSK Ins., Ltd.***, No. 01-2605-CM, 2003 WL 21143105, at *6 (D. Kan. Mar. 31, 2003). Application of these or any other exception is usually left to the first-filed court. Likewise, any jurisdictional

defects, or objections to venue would be decided by that court.

Even if this court were to consider the usual exceptions to the first-to-file rule, *see* ***Heatron***, 898 F. Supp. at 1494, the exceptions discussed by prior decisions in this district do not appear applicable in this arbitration case. The New Jersey case is not a declaratory judgment action, nor can it be easily categorized as an improper anticipatory filing made under threat of action by the opposing party. No court has held, however, that these are the only two "exceptions" to the first-to-file rule which could be considered.

Most of the cases cited by the parties and the court concerning the first-to-file rule and its exceptions do not involve cases where the parties are seeking to either vacate or confirm an arbitration award. This court is convinced that cases involving requests to either vacate or confirm arbitration awards are distinguishable from other types of cases, and a blind adherence to the first-to-file rule could easily result in significant delay, additional cost and prejudice to one of the parties – some of the very things arbitration was designed to avoid.[2] This

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[2] One of the reasons arbitration is favored is the presumption that arbitration (and other contractual ADR procedures) will resolve disputes more quickly and at less expense to the parties than litigation in court. *See, e.g.*, ***Dean Witter Reynolds, Inc. v. Byrd***, 470 U.S. 213, 219, 105 S. Ct. 1238, 1241, 84 L. Ed. 2d 158 (1985) (referring to the FAA's goal of "speedy and efficient decision-making.") This case, however, demonstrates that this assumption is not universally correct. It has been more than four years since Johnson initially filed his claim

would definitely be the result should it ultimately be determined that venue was not proper in the first-filed action.

While this is a possibility in all types of actions, cases under the FAA do differ somewhat. In the arbitration context, there will almost always be two separate requests for relief and therefore two separate lawsuits – one seeking confirmation of the award and the other seeking to vacate the award. In addition, where the award directs payment at a time in the future, it is far more likely that the party seeking to vacate the award will file their action to vacate prior to the date for performance, as Pfizer did in this case. That is wholly appropriate. However, the winning party will not normally file an action for judicial confirmation of the award until after the deadline for payment has passed without compliance by the loser so that the arbitration award can then be enforced in court. If the first-to-file rule is mechanically applied by the courts, the losing party will almost always be the first-to-file and will therefore pick the court that will decide the ultimate forum to decide questions of jurisdiction and venue.[3]

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under the plan procedures, and the fees awarded by the arbitration panel indicate that the procedure has not been inexpensive.

[3] While there is no reason to believe that any particular federal court will tend to favor the filing party (e.g., there is no reason to believe that the new Jersey court will be a more "favorable" forum to Pfizer than would Kansas), the selection of a distant forum may, intentionally or unintentionally, be a significant burden to

As Pfizer correctly notes, the venue provisions in sections 9 and 10 of the FAA are not exclusive, and therefore actions concerning the arbitration award can also be brought in other courts where venue is proper under 28 U.S.C. § 1391. *See* ***Cortez Byrd Chips, Inc. v. Bill Harbert Constr.,*** 529 U.S. 193, 120 S. Ct. 1331, 146 L. Ed. 2d 171 (2000); ***P&P Indus. v. Sutter Corp.,*** 179 F.3d 861 (10th Cir. 1999). But, while proper venue under § 1391 can be an intensely factual issue, Congress has made it crystal clear that under the FAA venue is always proper (although not exclusive) in the district where the arbitration award was made unless the arbitration agreement has specified another court. 9 U.S.C. § 9. *See also* 9 U.S.C. §§ 10, 11. In this case, Congress has specifically provided that venue is undisputedly proper in Kansas since that is where the arbitration award was entered and since the arbitration provision does not state any other specific forum that might be appropriate. The propriety of venue in a state other than Kansas, including New Jersey, is more problematic.[4] For this reason, the court

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an opposing party. This is particularly true where, as in this case, the winning party would be required to litigate the important question of the selection of the proper forum in a distant court just because it was the site of the first-filed action.

[4] For example, in this case, Pfizer does not attempt to explain how venue is proper in New Jersey under the general federal venue statute, 28 U.S.C. § 1391. The only statement in the New Jersey complaint is a conclusory allegation that there is proper venue under 28 U.S.C. § 1391 and the Federal Arbitration Act, 9 U.S.C. § 9. (Doc. 5, Ex. C at ¶ 9.) The New Jersey complaint does not contain

believes that it would be logical to modify application of the first-to-file rule in situations dealing with arbitration awards so that the decision of who should make the initial determination of the proper venue and jurisdiction for any cases would be made by the district court specifically mentioned in the FAA – the federal district court where the arbitration award was made.[5]

The Tenth Circuit has acknowledged that "merely because a court has the power to confirm an award does not always mean that it should do so." ***P&P Industries,*** 179 F.3d at 870 n.6. Often, concerns such as the first-to-file rule will play a role in deciding which court, of the many that have power to confirm the award, should in fact do so. *Id.* Other reasons may exist for a transfer under 28 U.S.C. § 1404 or the common law doctrine of *forum non conveniens*. *Id.* These other factors can all be considered by the court where the award was made just as

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sufficient facts to ascertain how the general venue statute applies to the New Jersey case. For example, there is no allegation that a substantial part of the events giving rise to the claim occurred in New Jersey or that Defendant either resides or is subject to personal jurisdiction in New Jersey. *See* 28 U.S.C. § 1391(a)(1)-(3). The complaint only alleges that Pfizer is incorporated in Delaware and has its principal place of business in New York, New York. *Id.* at ¶ 4.

[5] There may be cases where neither party seeks to vacate or confirm the arbitration award in the district court where the award was made. *See, e.g.*, ***Cortez Byrd***, 120 S. Ct. at 1337. In that situation, application of the first-to-file rule would carry more weight in deciding which court should make an initial determination as to the proper forum.

easily as they could be considered by a first-to-file court. If the decision was consistently made by the court where the award was made, this would preserve the flexibility of choosing a proper venue for decision on the merits, *see* ***Cortez Byrd,*** 120 S. Ct. at 1337, without the artificiality of having that decision depend upon the mere happenstance of who is quicker to the courthouse.[6] Such a modification to the first-to-file rule in the arbitration setting would also conserve judicial resources. It would obviate, or at least minimize, the need for two courts to consider the questions of whether the first-to-file rule should be applied, whether there are exceptions that justify the refusal to apply the rule, and whether either case should be stayed. Only one court – the court where the award was entered – would have to grapple with these questions. This would speed up the process of determining the proper forum and would minimize the costs and expenses for all parties.

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[6] The place where the arbitration is to be held, and thus where the arbitration award will be made, is often established in the underlying agreement to arbitrate. When the agreement to arbitrate is silent on this issue and the place of arbitration is decided by the arbitration panel, that panel will already have considered important factors relevant to why the arbitration should be held in one location versus another. In either event, there will have been some meaningful thought as to the location of the arbitration. Therefore, it is more logical to have the court in the district where the arbitration award was entered make the important early decisions about the forum for vacating or confirming the award rather than using the forum selected by the party who filed first.

While the court believes that the above procedure is more logical and efficient in cases involving arbitration awards than blind adherence to the first-to-file rule, it has been unable to find any authority on point for such a procedure. The court is hesitant to establish such a rule as a matter of first impression in this case. Therefore, the court will reluctantly follow the first-to-file rule and will stay this case until the District of New Jersey has decided: (a) whether any judicial confirmation of the award is authorized by the FAA in this case; (b) whether the first-to-file rule should be applied in this case; and (c) whether the merits of the case should be decided in New Jersey or transferred back to Kansas.

In making this decision, the court is cognizant of the fact that this may place an undue burden on the plaintiff, Johnson, who will be required to obtain new or additional legal representation in New Jersey to address the above issues. This is exacerbated in the present case by the fact that the forum selected by Pfizer is far from Johnson's home and far from the place where the arbitration was conducted. This will undoubtedly result in additional costs for Johnson not only for additional and duplicative attorneys fees, but also for his own costs of travel to New Jersey. Pfizer argues that financial disparity between the parties is of no legal relevance and should not be considered by this court. (Doc. 13 at 9 n.4.) The court does not agree. Courts routinely scrutinize arbitration agreements to determine whether a

party to the agreement would be disadvantaged financially by the requirement of arbitration, and the courts have not hesitated to either refuse to enforce arbitration agreements which are financially one-sided or to sever the offending cost provisions of the agreement on a case-by-case basis.[7] *See, e.g.*, **In re *Universal Serv. Fund Tele. Billing Practices Litig.***, 300 F. Supp. 2d 1107 (D. Kan. 2003); ***Spinetti v. Serv. Corp. Int'l***, 240 F. Supp. 2d 350, 356-57 (W.D. Pa. 2001), *aff'd* 324 F.3d 212 (3d Cir. 2003); *c.f.* ***Green Tree Financial Corp. v. Randolph***, 531 U.S. 79, 91-92, 121 S. Ct. 513, 522, 148 L. Ed. 2d 373 (2000). These cost issues, however, can be addressed by the court in New Jersey in determining the proper forum. *See* ***Ed Tobergte***, 83 F. Supp. 2d at 1199 ("The mere fact that a court may find jurisdiction lacking does not change the first-to-file rule.").

Therefore, the court orders that Defendant's Motion for Stay is **GRANTED**. This case will be stayed pending a final termination of the proceedings that are pending in the District of New Jersey, ***Pfizer, Inc. v. David S. Johnson***, Case no. 04-2158 (JCL).

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[7] In this case, the additional cost of arbitration has been addressed by the requirement in the arbitration agreement that all costs of the arbitration including Johnson's attorneys fees are to be paid by Pfizer. *See* Doc. 5, Ex. A at § 21. Whether that provision for payment of costs extends to costs expended by Johnson in proceedings to vacate or confirm the arbitration award entered in his favor has not yet been addressed.

Defendant also argues in its brief that Plaintiffs should be judicially estopped from proceeding in the Kansas case because Johnson's prosecution of the Kansas case is at odds with his stated reasons for requesting a stay in the New Jersey case and would give Johnson an unfair advantage. While Johnson's conduct does appear to be wholly inconsistent, because the court has stayed this case, Johnson will not benefit from any potential unfair advantage as a result of the prior stay of the New Jersey case. This court, or the New Jersey court may consider the estoppel claim in the future, if necessary.

IT IS THEREFORE ORDERED that Defendant's Motion for Stay (Doc. 5) is **GRANTED** and its Motion to Transfer is **DENIED** without prejudice until such time as the proceedings in the District of New Jersey have reached a final termination.

Dated at Wichita, Kansas, on this 10th day of December 2004.

s/ Donald W. Bostwick
DONALD W. BOSTWICK
UNITED STATES MAGISTRATE JUDGE